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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS
LOCAL 70 OF ALAMEDA COUNTY;
DANIEL J. LYDON; and JON A. UNDEEN,
Petitioners,

v.

WESTERN PACIFIC RAILROAD COMPANY,
WESTERN PACIFIC TRANSPORT COMPANY and
UNION PACIFIC CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Where individuals who were employed by a trucking company governed by the National Labor Relations Act seek relief against a railroad entity, is their action subject to the provisions of the Railway Labor Act where they do not perform services for that railroad?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Airline Pilots Association v. United Airlines, Inc., 802 F.2d 886 (7th Cir. 1986), —— *cert. denied* —— (1987)	8
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	6
Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. —— (1987)	6
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969)	7
Burlington Northern v. Maintenance Employees, 481 U.S. —— (1987)	6
Georgia-Pacific Corp., 220 N.L.R.B. 885 (1975)	7-8
Kelly v. Southern Pacific Co., 419 U.S. 318 (1974)	10
Local 295, Teamsters, 255 N.L.R.B. 1091, 1092 (1981)	7
Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984)	9
Pacific Motor Trucking Co., 132 N.L.R.B. No. 83 (1961)	7
Pan American World Airways v. United Brotherhood of Carpenters, 324 F.2d 217 (9th Cir. 1963)	9
Vaca v. Sipes, 386 U.S. 171 (1967)	6
Williams v. Caterpillar Tractor Co., 482 U.S. —— (1987)	6

STATUTES:	
28 U.S.C. § 1331	4
28 U.S.C. § 1337	4
29 U.S.C. § 101	6
29 U.S.C. § 152	4
29 U.S.C. § 185	4
45 U.S.C. § 141	8
45 U.S.C. § 151, First	9
45 U.S.C. § 151, Fifth	8, 9
Railway Labor Act, 45 U.S.C. § 151 *et seq.*	*passim*
45 U.S.C. § 231	9

IN THE

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No.

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v.

WESTERN PACIFIC RAILROAD COMPANY,
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UNION PACIFIC CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circiut in *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, et al., v. Western Pacific Railroad Co., et al.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 809 F.2d 607 and is reprinted *infra* at App. 1a. The order of the United States District Court for the Northern District of California granting summary judgment is unreported and is printed *infra* at App. 8a. The order of the Ninth Cir-

cuit denying the petition for rehearing and suggestion of hearing en banc is reprinted at App. 9a. A portion of the "Transfer Agreement" which is the subject of this litigation is reprinted at App. 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 4, 1987. A timely petition for rehearing and suggestion of hearing en banc was denied on April 29, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

45 U.S.C. § 151, Fifth:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of a service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . ."

STATEMENT OF THE CASE

Petitioner Brotherhood of Teamsters and Auto Truck Drivers (Local 70)[1] historically represented the employ-

[1] In addition to Local 70, the displaced employees were parties to the litigation. Two of them, Jon Undeen and Daniel Lydon, are

ees who had performed trucking and ramping operations at a railhead terminal in Oakland, California. Between 1967 and 1973 the ramping and trucking operation was operated by a common carrier, Haslett Trucking. In 1973, Western Pacific Transport Company, a subsidiary of Western Pacific Railroad Company, took over those operations and adopted the collective bargaining agreement which Haslett Trucking had entered into with Local 70.

In 1979 Western Pacific Transport Company negotiated with the union an agreement whereby it *split* the trucking from the ramping operation. The trucking operation involved drayage of piggyback trailers in the Oakland area. The ramping operation involved the removal and placing of those trailers from railroad flat cars of railroad flat cars. The company established a separate subsidiary to perform the ramping and deramping operation while Western Pacific Transport continued to perform the drayage work. As a result of the splitting of the work, Local 70 and Western Pacific entered into an agreement known as the "Transfer Agreement". App. 11a. The new subsidiary which was established to perform the ramping operation was named Feather River intermudal Service Company (FRISCO). The Transfer Agreement contains a critical paragraph which is the basis of this litigation:

> "The continued successor rights of FRISCO employees in the event the ramping and deramping work is contracted out to another carrier shall be guaranteed by the Western Pacific Railroad Company." (App. 13a)

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parties to this petition although they are subsumed under the references to Local 70. The other individuals who appealed to the Ninth Circuit obtained separate counsel and did not join in the petition for rehearing and suggestion of hearing en banc and have not joined in this petition. Local 70, Mr. Lydon and Mr. Undeen as well as the other petitioners are asserting their rights under the Railway Labor Act by demanding a Board of Adjustment with the railroad entities.

The parties to that Transfer Agreement were Local 70 and FRISCO, the subsidiary of Western Railroad. The Transfer Agreement also states:

> "Prior to the executing of this Agreement, the Employer agrees that it shall be submitted to the Western Pacific Railroad Company for review and approval." (App. 11a)

As a result of this Transfer Agreement the separate operations began in the Spring of 1979 and some employees continued with the drayage operation (Western Pacific Transport) while others moved to the ramping operation. Shortly a totally unrelated entity known as Reacon bought the ramping operation and continued the business under the name of FRISCO. A successor agreement was negotiated with Local 70 in 1982.

After the 1982 agreement was consummated, Western Pacific Railroad merged into the Union Pacific Company and that merged railroad began operating the ramping operation. The Union Pacific decided, effective January 10, 1986, to utilize employees of its motor freight company, Union Pacific Motor Freight Company, to perform the ramping work thus displacing the employees represented by Local 70. This litigation was triggered by the January 10, 1986 displacement of the incumbent employees.

Local 70 brought this action in the District Court asserting jurisdiction upon 29 U.S.C. § 185, 28 U.S.C. §§ 1331 and 1337. The Union alleged the Transfer Agreement which it sought to enforce was an agreement governed by the National Labor Relations Act and, thus, was an agreement between "an employer and a labor organization representing employees in an industry effecting commerce as defined in [29 U.S.C. § 152] . . ." When the railroad entities responded, they conceded jurisdiction citing 29 U.S.C. § 185.[2] The trial court granted summary

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[2] They also stated: "*New York Central Transport Co.*, 138 NLRB 131, . . . (1962) (company performing trucking work in connec-

judgment to the railroad defendants solely on the ground that the intervening agreement negotiated in 1982 between Local 70 and Reacon, which was a wholly unrelated to the railroad defendant, effectively nullified the Transfer Agreement of 1979. Local 70's argument that there was bargaining history demonstrating that the parties to the Reacon agreement had not intended to affect the Transfer Agreement was ignored by the District Court and Local 70 filed an appeal from the grant of summary judgment. In the Ninth Circuit the primary issue was whether the trial court properly granted summary judgment. The Ninth Circuit agreed that summary judgment was improper but held that this dispute was subject to the provisions of the Railway Labor Act. The railroad defendants had made such an argument in the Ninth Circuit seemingly contravening the position adopted initially in the District Court.

The Court below held that this was a Railway Labor Act dispute because "this case is essentially a Railway Labor dispute between the railroad and certain of its employees".

The question presented to this Court is whether individuals who are employed by a trucking subsidiary at the time the Transfer Agreement was negotiated which they allege guarantees continuing employment is subject to the Railway Labor Act where those individuals have never performed "any work defined as that of an employee" of the railroad?

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tion with "piggyback" operations comes within "trucking services" exception to Railway Labor Act (the R.L.A.), 45 U.S.C. § 151 et seq., and is within the L.M.R.A.). *See* Judge Zirpoli's opinion in *Calif. Trucking Ass'n v. Teamsters*, 94 L.R.R.M. 2981, 2998 (N.D. Cal. 1977), *aff'd in part, rvs'd in part on other grounds*, 679 F.2d 1275 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (trucking operations wholly owned by railroad not within R.L.A.)" (Memorandum of Points and Authorities, dated February 24, 1986, p. 3).

REASONS FOR GRANTING THE WRIT

1. This Court has had recent opportunity to draw the jurisdictional distinctions between those claims which are founded upon breaches of collective bargaining agreements and state law claims. *See, Williams v. Caterpillar Tractor Co.*, 482 U.S. —— (1987) which embellishes upon doctrines which reach back to at least *Vaca v. Sipes*, 386 U.S. 171 (1967). See also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). This Court has also had the opportunity to resolve a recent dispute over the applicability of actions brought under the Federal Employers' Liability Act and those brought under the Railway Labor Act. *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. —— (1987). This court recently had to accommodate the competing demands of the Railway Labor Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, et seq. This Court found that the Norris-LaGuardia Act prevailed. *Burlington Northern v. Maintenance Employees*, 481 U.S. —— (1987). This Court has not, however, had the opportunity to determine when individuals become employees within the meaning of the Railway Labor Act as compared to employees of a National Labor Relations Act employer and thus to delineate this boundary.

As corporate structures change in light of the increasing number of buyouts, successorships and other corporate reorganizations, those entities which are exclusively Railway Labor Act carriers will diminish. Indeed, most entities have combined operations subjecting them to various regulation under both the National Labor Relations Act and the Railway Labor Act.

2. The decision of the Court below held that these employees who were displaced were Railway Labor Act employees and, thus, their exclusive remedy for breach of contract was through the arbitration provisions provided for in the Railway Labor Act. We, of course, concede that if they are governed by the Railway Labor Act, then they must proceed through the appropriate Board of Ad-

justment and the District Court lacked jurisdiction. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). The Court below had extended the provisions of the Railway Labor Act to those individuals who are expressly encompassed within the National Labor Relations Act solely because they assert relief against a railroad employer. Let us be clear on this question. Local 70 claims that the Transfer Agreement guaranteed the continued employment of the individuals working at the ramping and deramping operation. The union's point was that in return for agreeing to the Transfer Agreement which permitted the splitting of the seniority lists, the employing entities and the railroad guaranteed the continuing employment of the individuals. Thus, these employees who were plainly governed by the National Labor Relations Act sought relief against the railroad which relief could have taken various forms: (1) Back and front pay; (2) The hiring of a subcontractor who would employ the displaced individuals; (3) The hiring by the Union Pacific's trucking subsidiary of the individuals to perform the ramping operation; or (4) The employment directly by the railroad of the individuals to perform the ramping operation.[3] It is undisputed that the employees performing the ramping as well as the trucking operations were *not* employees subject to the Railway Labor Act but were subject to the National Labor Relations Act. Indeed, there is a long line of Labor Board cases asserting jurisdiction over identical employers. See, *Pacific Motor Trucking Co.*, 132 N.L.R.B. No. 83 (1961) and *Local 295, Teamsters*, 255 N.L.R.B. 1091, 1092 (1981). Cf. *Georgia-Pacific Corp.*, 220 N.L.R.B.

[3] It is because the union suggested this fourth form of relief which would have made the individuals employees of the railroad that the Court below implicated the Railway Labor Act. The form of relief does not govern the nature of the action and petitioner will abandon this form of relief in preference to the other three possible forms in order to establish jurisdiction under 29 U.S.C. § 185.

885 (1975) (when R.L.A. subsidiary is acquired by N.L.R.A. entity, R.L.A. applies). It seems entirely anomalous that employees who work for an employer governed by the National Labor Relations Act are precluded from seeking relief against a railroad which they assert became bound to a collective bargaining agreement by guaranteeing their continued jobs.

The analysis of the Court below concludes that where there is any allegation against the railroad, the Railway Labor Act is necessarily implicated. The Court held that it was "necessary to look at the substance of the dispute . . . [and viewing it] found this perspective, this case is essentially a Railway Labor dispute between the railroad and certain of its employees". (App. p. 5a.) The Court's rationale is directly at odds with other Courts of Appeal which have focused upon the statutory language of 45 U.S.C. § 151, Fifth, to determine whether the statutory definition of employee "who performs any work defined as that of an employee . . ." occurs. The question is not, as the Court below believed, whether the dispute is between a railroad and its alleged employees but, rather, whether the individuals are *actually performing work* for the carrier whose labor relations are subject to resolution by the Railway Labor Act.

The decision of the Court below squarely conflicts with the recent decision of the Seventh Circuit in *Airline Pilots Association v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), cert. denied —— U.S. —— (1987). In that case certain individuals known as the "group of 500" asserted a claim against United Airlines on the theory that as "trainees" they became employees thus subject to regulation by the Railway Labor Act. The Seventh Circuit rejected this contention and concluded "that unless a person has performed services for the [railroad] employer under that employer's supervision he is not an employee for purposes of the R.L.A." *Id.* at 913. (Footnote omitted.) The Fourth Circuit used exactly the same

rationale in *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), cert. denied, 471 U.S. 1116 (1985) where the Court held that an applicant for a job is not an employee under the R.L.A. and, therefore, not entitled to base its claim upon its provisions.

The opinion of the Court below thus conflicts with the decision of the Seventh and Fourth Circuits which have interpreted the Railway Labor Act to require that work *actually be performed* before an individual creates the employee-employer relationship which the statute envisions. Indeed, we thought that the Ninth Circuit's earlier decision in *Pan American World Airways v. United Brotherhood of Carpenters*, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964) is consistent with the approach of the other Circuits. In that case Pan American operated a facility in Nevada which was established for the purpose of nuclear research. The Ninth Circuit concluded that the provisions of the Railway Labor Act were not applicable even though Pan American was an air transportation carrier generally regulated by the Railway Labor Act because the activities were not transportation related. Thus, these cases hold that the provisions of the Railway Labor Act expressly apply only to those employees of "carriers" as defined in 45 U.S.C. § 151, First.

Only the Court below in this recent opinion has expanded the definition of "carrier" and "employee" to encompass a claim against a railroad even though the individuals involved have not performed any work performed any work for the railroad.

3. By expanding the definition of "employee" beyond the metes and bounds of § 151, Fifth, the Court below invites a square conflict with other legislation designed to regulate railway employment. For example, the decision would now suggest that the employees represented by Local 70 are covered by the Railroad Retirement Act 45 U.S.C. § 231, *et seq.* and the Federal Employers' Liabil-

ity Act. 45 U.S.C. 151 *et seq.* Cf. *Kelly v. Southern Pacific Co.*, 419 U.S. 318 (1974). We think this court has made it clear that one has to examine the statutory language to determine the applicability of those statutes rather than determine, as the Court below did, simply whether the defendant is a railway operator.

4. It is apparent that the decision of the Court below is at odds with common sense. The employees were all employed by an entity which all parties conceded was subject to the jurisdiction of the National Labor Relations Act. The "Transfer Agreement" was a guarantee by the railroad that it would continue to use subcontractors (either subsidiaries or independent contractors) who would continue to employ the individuals involved. When that guarantee was breached, relief was sought against the parent corporations which turned out also to be railroads. For the purposes of this Petition, however, what requires this Court to grant a hearing is that the Court below has created such an expansive definition of Railway Labor Act "employee" that the mere assertion of a dispute with a Railway Labor Act carrier will now trigger the provisions of the Railway Labor Act. This is at odds with the Fourth and Seventh Circuits which have had occasion recently to consider the narrowly drafted language defining an employee under the Railway Labor Act. In order to resolve this conflict between the circuits as to the statutory language and to avoid an unwarranted expansion of the law which would bring many individuals employed by railway subsidiaries under the Railway Labor Act and other railway legislation, this Court should grant this Petition for a Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1810

D.C. No. 86-0364WWS

ORDER AND AMENDED OPINION

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70 OF ALAMEDA COUNTY, CAPP, ROBERT L.; HALLIDAY, JOHN P. JR.; LEWIS, HOWARD S.; ORMAN, KENNETH E.; TAMBORSKI, JOHN W.; DERRICK, ROBERT L.; HEDGE, RICHARD M.; LYDON, DANIEL J.; PRATT, WILLIAM H. JR.; TREJO, AUGUST; DICHERICO, JEFF; HOSTNICK, DONALD D.; MORGAN, BILL D.; SCHILLING, BARRY M.; UNDEEN, JON A.; DICHERICO, VINCENT T.; HOWARD, JAMES E.; MORGAN, LESLIE T. and SWINEY, TRUMAN,

Plaintiffs-Appellants,

v.

WESTERN PACIFIC RAILROAD COMPANY, WESTERN PACIFIC TRANSPORT COMPANY and UNION PACIFIC CORPORATION,

Defendants-Appellees.

Argued and Submitted
November 14, 1986—San Francisco, California

Filed February 4, 1987

Amended April 21, 1987

Before: Anthony M. Kennedy and Robert Boochever,
Circuit Judges, and Albert Lee Stephens, J.,*
District Judge.

Opinion by Judge Stephens

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

OPINION

STEPHENS, Senior District Judge:

The individual plaintiffs and their union allege that the defendants are obligated to provide lifetime employment to the individual plaintiffs pursuant to a provision in a collective bargaining agreement. The district court denied plaintiffs' motion for a preliminary injunction and granted sumary judgment in favor of defendants. This court concludes that the judgment should be vacated due to a lack of subject matter jurisdiction.

Prior to its merger with Union Pacific Railroad Company (Union Pacific), Western Pacific Railroad Company (Western Pacific) maintained a ramp facility in Oakland where ramping and trucking operations were performed. The ramping work involved the loading and unloading of truck-trailers onto and from railroad flatcars. The trucking operations involved delivery of the trailers to and from locations in the Bay Area.

From 1973 to 1979, Western Pacific Transport Company (Transport), a subsidiary of Western Pacific, performed both the ramping and trucking work at the facility. It employed members of the Teamsters Local No. 70

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

and had a collective bargaining agreement with the union which represented and bargained on behalf of the named individual plaintiffs. In 1979, Western Pacific created a new subsidiary named the Feather River Intermodal Services Company (FRISCO) to perform the loading and unloading work at the facility. Transport continued to perform the trucking work.

When FRISCO was formed, Local No. 70 negotiated a "Transfer Agreement" with Transport and FRISCO which provided for the transfer of certain Transport employees, with their seniority rights intact, to FRISCO. The agreement included the following paragraph (hereinafter the "successor rights provision"), which is the basis of this litigation: "The continued successor rights of F.R.I.S.C.O. employees in the event the ramping and deramping work is contracted out to another carrier shall be guaranteed by the Western Pacific Railroad Company."

After the execution of the Transfer Agreement, the individual plaintiffs were transferred from the payroll of Transport to the payroll of FRISCO and continued to perform the loading and unloading work as they had for Transport. FRISCO agreed to be bound by the same collective bargaining agreement in effect between Local No. 70 and Transport, and the Transfer Agreement was formally incorporated into a rider to the FRISCO-Local No. 70 collective bargaining agreement.

One year later in 1980, Western Pacific sold FRISCO to an unrelated Chicago comapny called Reacon. Reacon continued performing the same work that FRISCO had and retained the name FRISCO for its operations. It also accepted the existing agreement in effect between FRISCO and Local No. 70. When that agreement expired in 1982. Reacon and Local No. 70 negotiated a new and substantially modified three-year contract. In the course of the negotiations. Reacon refused to agree to the language in the Transfer Agreement regarding suc-

cessor rights. Consequently, the resulting agreement did not contain the successor rights provision. For clarity in this regard, the new agreement expressly stated that all previous agreements were void and superseded.

During the period when Reacon operated FRISCO, Western Pacific merged with Union Pacific. When the 1982 agreement between Western Pacific and Reacon regarding the ramping operations expired in 1985 it was not renewed. Instead, Union Pacific hired Union Pacific Motor Freight Company to perform the loading and unloading. In January 1986, Union Pacific Motor Freight replaced the individual plaintiffs with its own employees.

Local No. 70 and the individual plaintiffs filed suit alleging that the successor rights provision in the Transfer Agreement was, in effect, a guarantee of lifetime employment to the individual plaintiffs by Western Pacific and that Union Pacific assumed this obligation by virtue of the merger. The plaintiffs also filed a motion for a preliminary injunction seeking their immediate reinstatement to their former jobs. The defendants opposed the motion and filed a motion for summary judgment alleging that there was no obligation or agreement in existence between the parties. The district court denied the motion for a preliminary injunction and granted summary judgment in favor of the defendants. The court ruled that the plaintiffs had abandoned their rights under the successor rights provision at the bargaining table with Reacon in 1982. The plaintiffs then filed a timely appeal.

The issue on appeal is whether the successor rights provision is a guarantee of lifetime employment by Western Pacific that survived the expiration of the collective bargaining agreement in which it was contained. The plaintiffs argue that it was the contracting parties' intent to have the provision survive the agreement's expiration. The defendants argue that Western Pacific never guaranteed the successor rights and that the provision, along

with the agreement as a whole, was superseded and voided by the plaintiffs' agreement with Reacon.

A jurisdictional issue must be addressed before proceeding to the merits. The plaintiffs contend that the district court had jurisdiction over this case pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. sec. 185(a). However, the plaintiffs made it clear that this is a suit to enforce disputed obligations against the railroad defendants. *See, e.g.*, Plaintiffs-Appellants Excerpt of Record Exhibit No. 14.[1] Railway labor disputes between railroads and their alleged employees fall within the scope of the Railway Labor Act, 45 U.S.C. secs. 151-188, and federal courts may not exercise jurisdiction over such disputes pursuant to Section 301(a). *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1979).

Plaintiffs argue that the Railway Labor Act does not apply because one of the defendants, Transport, is not a railroad. However, it is necessary to look at the substance of the dispute. *E.g., id.; Pan American World Airways v. United Brotherhood of Carpenters*, 324 F.2d 217 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964). Viewed from this perspective, this case is essentially a railway labor dispute between the railroad and certain of its employees. This dispute arises out of a labor agreement negotiated by a labor union on behalf of certain of its members and requires interpretation of the labor agreement.

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[1] Exhibit No. 14 is plaintiffs' Concluding Memorandum in Support of Motion for Preliminary Injunction And In Opposition To Motion For Summary Judgment. In it, plaintiffs state: "We seek relief from the railroad, which guaranteed the employment of these individuals. If the Court grants the injunction, the railroad will be required to hire the plaintiffs to perform the work, either directly or through another subcontractor."

When a railway labor dispute involves the interpretation of a collective bargaining agreement, the Railway Labor Act requires that it be submitted to arbitration: the federal courts do not have jurisdiction to resolve the dispute. *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985); *Fechtelkotter v. Air Line Pilots Ass'n Int'l.* 693 F.2d 899 (9th Cir. 1982).[2] Congress designed the Act to leave the resolution of many types of railroad labor disputes to the machinery of arbitration, mediation, and bargaining. *Klemens v. Air Line Pilots Ass'n Int'l*, 736 F.2d 491, 497 (9th Cir. 1984); *e.g., Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970 (9th Cir. 1986). The Act reflects strong policies in favor of arbitration and against judicial intervention. *Fechtelkotter*, 693 F.2d at 901.

The defendants argue that there is no agreement binding the parties. Their position could lead to the conclusion that no interpretation of an agreement is involved because there is no agreement at all and that federal court jurisdiction is therefore proper. *E.g., Goclowski v. Penn. Central Transp. Co.*, 571 F.2d 747 756 (3rd Cir. 1977). However, *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968), held that "where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement," the suit involves the interpretation of an agreement and must be submitted to arbitration. The plaintiffs have expressly predicated this action upon the terms of the agreement. *See, e.g., Brotherhood of Railway Carmen v. Pacific Fruit Express Co.*, 651 F.2d 651, 652 (9th Cir. 1981) (court followed *Switchmen's Union* and held that if agreement is "argu-

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[2] Such a dispute is termed a "minor" one for purposes of the Act. *See Aloha Airlines*, 776 F.2d at 815 (explaining the distinction between a "minor" and "major" dispute).

ably susceptible" to party's construction it must be submitted to arbitration pursuant to the Act).

The district judge's view of the merits is understandable. However, the federal courts are not the proper forum to resolve this dispute. The grant of summary judgment in favor of defendants is vacated and the case is remanded to the district court which should dismiss the case for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86 0364 WWS

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70 OF ALAMEDA COUNTY, *et al.*,
Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY, WESTERN PACIFIC TRANSPORT COMPANY and UNION PACIFIC CORPORATION,
Defendants.

[Filed Mar. 7, 1986]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' related and counter-motion for summary judgment having come on for hearing before me and consolidated with the hearing on plaintiffs' application for preliminary injunction and having considered the papers submitted in support of the motion and in opposition thereto and argument of counsel and good cause appearing,

IT IS HEREBY ORDERED that defendants' motion be and the same hereby is GRANTED.

DATED: March 7, 1986.

/s/ William W. Schwarze
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1810

D.C. No. 86-0364WWS

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70 OF ALAMEDA COUNTY, *et al.*,
Plaintiffs-Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, *et al.*,
Defendants-Appellees.

[Filed Apr. 29, 1987]

Appeal from the United States District Court
for the Northern District of California

ORDER

Before: KENNEDY and BOOCHEVER, Circuit Judges, and STEPHENS,* District Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Boochever have voted to reject the suggestion for re-

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

hearing en banc, and Judge Stephens recommends rejection of the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

AGREEMENT

Between

Western Pacific Transport Company

and

Teamsters Local No. 70

THIS AGREEMENT is entered into by and between WESTERN PACIFIC TRANSPORT COMPANY (W.P.T. Company) and TEAMSTERS LOCAL 70 relative to the establishment of a new company to take over the ramping and deramping operations presently performed by Western Pacific Transport Company. Such new company FEATHER RIVER INTERMODAL SERVICES COMPANY (hereafter referred to as F.R.I.S.C.O., and shall likewise become a party to this Agreement upon its execution. Prior to executing this Agreement, the Employer agrees that it shall be submitted to the Western Pacific Railroad Company for review and approval.

IT IS FURTHER AGREED THAT:

ARTICLE I. Prior to the expiration of W.P.T. Company's agreement, all its present employees working under the Local # 70 Agreement shall be offered the opportunity in accordance with their seniority to transfer to F.R.I.S.C.O. with their seniority and all other contract rights unimpaired. Job selection (bidding) opportunities shall be accomplished at the time of the transfer and shall be awarded on the basis of seniority. Employees not electing to transfer to F.R.I.S.C.O. at the point of offering shall be passed and may then only lay claim to transfer rights with full seniority on any remaining jobs after all other employees have been asked.

Sixty days after the initial transfer of employees the Employer shall make a final offering of transfer with

full seniority rights to cover any unfilled vacancies. Transferring employees shall carry with them their full seniority, but shall not be permitted to displace previously transferred employees from their bids. Positions unfilled at the conclusion of this period shall be filled by new hires. During this sixty day period, however, four (4) of the transferring employees may be permitted to return to W.P.T. Company with their seniority rights unimpaired only if the Employer alters its operation in a manner to cause the abolishment of a Piggy-Packer crew.

All future permanent job opportunities unfilled by F.R.I.S.C.O. employees shall be offered to W.P.T. Company employees limited to those hired by May 1, 1979. They shall, however, transfer over as new hires and shall retain seniority rights only for purposes to benefits (e.g. vacation accrual).

A permanent job opportunity shall be determined either by attrition of the F.R.I.S.C.O. seniority roster or the excessive and continuous use of casuals during other than peak vacation periods.

When F.R.I.S.C.O. requests casual employees from the Local # 70 Hiring Hall, they shall first place a request for any W.P.T. laid off employees, who shall be entitled to preferential dispatch rights, but will however be recognized for all other intents and purposes as a casual employee. W.P.T. Company shall grant similar reciprocal rights to F.R.I.S.C.O. laid off employees.

In the event the Employer establishes a new piggyback ramp facility in Northern California outside the territorial jurisdiction of Teamsters Local 70, job opportunities not filled by any displaced employees shall be offered to FR.I.S.C.O. or W.P.T. Company employees into their respective work classification in accordance with their seniority.

The continued successor rights of F.R.I.S.C.O. employees in the event the ramping and deramping work is contracted out to another carrier shall be guaranteed by the Western Pacific Railroad Company.

Except as provided for in the use of casuals; transfer and successor rights at F.R.I.S.C.O. are red-circled for those W.P.T. Company employees hired prior to May 1, 1979 only.

[Articles 2, 3 and 4 deleted]

TEAMSTERS LOCAL 70
[Signatures Deleted]

WESTERN PACIFIC TRANSPORT COMPANY
[Signature deleted]

FEATHER RIVER TRANSPORT SERVICE COMPANY
[Signature deleted]

[Dated 4-16-79]

87-164

No.

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BROTHERHOOD OF TEAMSTERS
and AUTO TRUCK DRIVERS
LOCAL 70 OF ALAMEDA COUNTY;
DANIEL J. LYDON; and
JON A. UNDEEN,
Petitioners,

VS.

WESTERN PACIFIC RAILROAD
COMPANY; WESTERN PACIFIC
TRANSPORT COMPANY; and
UNION PACIFIC CORPORATION,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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16 pp

QUESTION PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit correctly conclude that plaintiffs who allege a right to "guaranteed" employment by a railroad to load and unload railroad cars must proceed to arbitration under the Railway Labor Act when their alleged right to employment depends upon the interpretation or construction of agreements arrived at in the collective bargaining process?

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are petitioners, the Brotherhood of Teamsters and Auto Truck Drivers Local 70 of Alameda County, Daniel J. Lydon, and Jon A. Undeen, and respondents, the Western Pacific Railroad Company, Western Pacific Transport Company and Union Pacific Railroad Company (sued herein as the Union Pacific Corporation).

The corporate respondents know of the following additional entities within the meaning of Supreme Court Rule 28.1 that should be disclosed to enable the Honorable Justices of this Court to evaluate the possibility of recusal:

Missouri Pacific Railroad Company
Union Pacific Corporation
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining, Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company
Galveston, Houston and Henderson Railway Company

Houston Belt & Terminal Railway Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Pueblo Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company
Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Champlin Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company
Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company

Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.
Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.
Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
JURISDICTIONAL BASIS	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
A. The Court Of Appeals' Finding That This Dispute Must Be Arbitrated Under The Railway Labor Act Is Compelled By The Undisputed Record	3
B. Plaintiffs Have No Enforceable Rights Against Any Respondent Under The 1979 Transfer Agreement	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

	Page
Airline Pilots' Assn. v. United Airlines, Inc., 802 F.2d 886 (7th Cir. 1986), cert. denied, U.S. , 94 L.Ed.2d 791 (1987)	5
Alexander v. Angel, 37 Cal.2d 856 (1951)	6
Broth. Of Ry. Carmen, Etc. v. Pac. Fruit Exp. Co., 651 F.2d 651 (9th Cir. 1981)	4
Brotherhood Of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 22 L.Ed.2d 344 (1969)	4
Corbin v. Pan Am. World Airways, Inc., 432 F.Supp. 939 (N.D. Cal. 1977)	4
Crusos v. United Transp. Union Local 1201, 786 F.2d 970 (9th Cir.), cert. denied, ____ U.S. ____, 93 L.Ed. 2d 361 (1986)	4
Dist. 29, United Mine Workers v. Royal Co., 768 F.2d 588 (4th Cir. 1985)	6
Dones v. Eastern Airlines, Inc., 408 F.Supp. 1044 (D.P.R. 1975)	5
Fechtelkotter v. Airline Pilots Ass'n, 693 F.2d 899 (9th Cir. 1982)	4
George Foreman Associates, Ltd. v. Foreman, 389 F.Supp. 1308 (N.D. Cal. 1974), aff'd, 517 F.2d 354 (9th Cir. 1975)	6
Intern. Ass'n Of Mach. & Aer. W. v. Republic Air, 761 F.2d 1386 (9th Cir. 1985)	4
International Ass'n Of Machinists v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985)	4
Local 1477 United Transportation Union v. Baker, 482 F.2d 228 (6th Cir. 1973)	4
Lumber Prod. Indus. v. W. Coast Indus. Rel., 775 F.2d 1042 (9th Cir. 1985)	6
Masy v. New Jersey Transit Rail Operations, Inc., 790 F.2d 322 (3d Cir.), cert. denied, ____ U.S. ____, 93 L.Ed.2d 293 (1986)	4

TABLE OF AUTHORITIES

CASES

	Page
Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)	5
O'Donnell v. Wien Air Alaska, Inc., 551 F.2d 1141 (9th Cir. 1987)	4
Pan American World Airways v. United Bro. Of Carpenters, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964)	5
People ex rel. Dept. Pub. Wks. v. Metcalf, 79 Cal.App.3d 1 (1978)	6
Rader v. United Transp. Union, 718 F.2d 1012 (11th Cir. 1983)	4
Railway Labor Executives Ass'n v. Atchison, T. & S.F. Ry. Co., 430 F.2d 994 (9th Cir. 1970), cert. denied, 400 U.S. 1021 (1971)	4
Switchmen's Union Of North America v. Southern Pacific Co., 398 F.2d 443 (9th Cir. 1968)	4
United Transp. U. Gen. Of Adg. Prop. Of P. C. Co. v. Baker, 499 F.2d 727 (7th Cir.), cert. denied, 419 U.S. 839 (1974)	4

Statutes

28 U.S.C. § 1254(1)	1
29 U.S.C. § 142(3)	2, 4
29 U.S.C. § 152(2)	2, 4
45 U.S.C. § 151, First	2, 4

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BROTHERHOOD OF TEAMSTERS
and AUTO TRUCK DRIVERS
LOCAL 70 OF ALAMEDA COUNTY;
DANIEL J. LYDON; and
JON A. UNDEEN,
Petitioners,

VS.

WESTERN PACIFIC RAILROAD
COMPANY; WESTERN PACIFIC
TRANSPORT COMPANY; and
UNION PACIFIC CORPORATION,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL BASIS

Petitioners assert jurisdiction under 28 U.S.C. Section 1254(1), but no conflict in the federal law or significant federal question is presented as required by Supreme Court Rule 17.1. On the contrary, the controlling law under the Railway Labor Act is well-settled, uniform, and that body of law is in no way "undermined" by the Ninth Circuit's adherence to well-established precedent.

STATUTORY PROVISIONS

In addition to the statutes cited by petitioners, respondents note the following relevant statutory provisions:

1. 29 U.S.C. Section 142(3):

> The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter.

2. 29 U.S.C. Section 152(2):

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, . . . or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

3. 45 U.S.C. Section 151:

> First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling or property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' . . . .

STATEMENT OF THE CASE

The pertinent facts are set forth in the opinion of the Ninth Circuit at pages 1a-7a of the appendix to the petition.

REASONS FOR DENYING THE WRIT

This petition should be denied. It presents no bona fide conflict in the decisions of the appellate courts or any significant question of federal law. More importantly, it is without merit. Petitioners have painted a highly distorted view of both the factual background of these proceedings and the respective contentions of the parties. On the other hand, a fair treatment of the record here shows that this case was resolved under unambiguous and uniform federal law that was applied—not because of some "error" in the Court of Appeals' reasoning process as petitioners erroneously claim—but because it was compelled by the very nature of the relief petitioners sought and the highly unique facts surrounding the collective bargaining agreements involved. The parochial dispute involved here presents no question of national significance and no threat to the well-settled federal law under either the Labor Management Relations Act or the Railway Labor Act.

A. The Court Of Appeals' Finding That This Dispute Must Be Arbitrated Under The Railway Labor Act Is Compelled By The Undisputed Record

While petitioners profess shock and surprise at the Court of Appeals' holding that this dispute was arbitrable under the Railway Labor Act, given: (1) petitioners' own express concessions in their pleadings; and (2) the unique history of their employment, the Ninth Circuit's reasoning can hardly be characterized as controversial in this case.[1] Since petitioners claim an alleged right to "guaranteed" employment by "the railroad"[2] to

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[1] That probably accounts for the fact that the seventeen other plaintiffs who are involved in this litigation have, as petitioners concede, initiated arbitration proceedings in accordance with the holding of the Ninth Circuit. Petition at 2-3, n. 1.

[2] Petitioners' express concession to this effect in their pleadings and at oral argument below is conspicuously absent from their petition. Yet, those concessions formed a significant part of the Ninth Circuit's jurisdictional analysis [appendix to petition at 5a & n.1], and that factual omission at this late date should therefore not be relied upon to undermine the reasoning process employed by the Ninth Circuit on the record actually before it. Petitioners claim that respondents "conceded"

load and unload railroad cars, the dispute they have framed can clearly be found to fall within the Railway Labor Act. *Compare*, 29 U.S.C. §§ 142(3) and 152(2), *with*, 45 U.S.C. § 151, First and *Brotherhood Of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376-377, 22 L.Ed.2d 344 (1969). Moreover, since the alleged right of employment petitioners would create depends upon the construction or interpretation of a series of collective bargaining agreements, the Ninth Circuit followed an unbroken line of federal authority in holding that this dispute must be submitteed to arbitration before the Railroad Adjustment or Mediation Board. *E.g., Masy v. New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 326 (3d Cir.), *cert. denied*, ____ U.S. ____, 93 L.Ed.2d 293 (1986); *Crusos v. United Transp. Union Local 1201*, 786 F.2d 970, 971-972 (9th Cir.), *cert. denied*, ____ U.S. ____, 93 L.Ed. 361 (1986); *International Ass'n Of Machinists v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985); *Fechtelkotter v. Airline Pilots Ass'n*, 693 F.2d 899, 902-903 (9th Cir. 1982); *Broth. Of Ry. Carmen, Etc. v. Pac. Fruit Exp. Co.*, 651 F.2d 651, 652-653 (9th Cir. 1981); *O'Donnel v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146-1147 (9th Cir. 1987); *United Transp. U. Gen. Of Adg. Prop. Of P. C. Co. v. Baker*, 499 F.2d 727, 730-734 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974); *Local 1477 United Transportation Union v. Baker*, 482 F.2d 228, 230-231 (6th Cir. 1973); *Railway Labor Executives Ass'n v. Atchison, T. & S.F. Ry. Co.*, 430 F.2d 994, 996-997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1974); *Switchmen's Union Of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968); *Corbin v. Pan Am. World Airways, Inc.*, 432 F.Supp. 939,

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the jurisdiction of the district court is equally misleading. When it became apparent that petitioners sought a right to employment with the railroad, respondents promptly raised the jurisdictional question in the district court. They did so again in the Ninth Circuit. In any event, given the record in this action and the nature of the dispute, the Ninth Circuit would have been free to reach the question of its own jurisdiction on its own. Whether respondents conceded jurisdiction (and they did not) is accordingly beside the point. *See, Intern. Ass'n Of Mach. & Aer. W. v. Republic Air*, 761 F.2d 1386, 1389-1390 (9th Cir. 1985); *Rader v. United Transp. Union*, 718 F.2d 1012, 1013-1014 (11th Cir. 1983).

942 (N.D. Cal. 1977); *Dones v. Eastern Airlines, Inc.*, 408 F.Supp. 1044, 1045-1046 (D.P.R. 1975).[3]

Thus, the opnion of the Ninth Circuit simply joins a uniform body of federal case law and adds to an already well-defined set of controlling principles. There is accordingly no need for this Court to invest its scarce resources to examine or reexamine anything that occurred here and the petition should be summarily denied on this ground alone.

B. Plaintiffs Have No Enforceable Rights Against Any Respondent Under The 1979 Transfer Agreement

While the Ninth Circuit did not expressly reach the issue, the district court concluded that petitioners had no enforceable "guarantee" of lifetime employment with the railroad or its subsidiary. That conclusion is also compelled on the facts of this case irrespective of any jurisdictional question.[4] As the Court of

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[3] *Airline Pilots' Assn. v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, 94 L.Ed.2d 791 (1987) and *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied.*, 471 U.S. 1116 (1985), cited by petitioners, do not create a "conflict" with the unbroken line of authority relied upon in this case. Both these cases hold only that prospective "applicants" for employment do not fall within the ambit of the Railway Labor Act. Petitioners do not claim to be applicants for employment. On the contrary, they seek to enforce an alleged right to "guaranteed" employment with "vested" seniority rights allegedly based upon the terms of an expired collective bargaining agreement. Petitioners' own allegations, therefore, bring them squarely within the well-established line of authority followed by the Ninth Circuit. To the extent that petitioners claim, moreover, that the Ninth Circuit's opinion in *Pan American World Airways v. United Bro. Of Carpenters*, 324 F.2d 217, 220-221 (9th Cir. 1963), *cert. denied*, 376 U.S. (1964), "conflicts" with either this case or the line of authority it follows, that purported conflict should, of course, be resolved by the Circuit Court and not this one. A review of the facts analyzed in *Pan American* and the facts relied upon here reveals, however, that petitioners' claims of "conflict" are, as with the applicant cases noted above, pure sophistry.

[4] While the petition claims that the Ninth Circuit disagreed with this holding of the district court, that contention is belied by the express

Appeals opinion shows, the Transfer Agreement was the exclusive creature of contracts developed in the collective bargaining process between Local 70 and various subcontractors. The successor rights clause never existed in any contract developed outside of that process. Yet the record also shows that that same Transfer Agreement was part of a collective bargaining agreement that was expressly superseded and revoked. No respondent made *any* agreement with petitioners independent of the Transfer Agreement and it is no longer in existence. The successor rights clause was—irrespective of its claimed significance now—simply one provision of a prior collective bargaining contract that ceased to have any independent force when it was not carried forward into the new agreement. *See, Lumber Prod. Indus. v. W. Coast Indus. Rel.*, 775 F.2d 1042, 1047 (9th Cir. 1985); *Dist. 29, United Mine Workers v. Royal Co.*, 768 F.2d 588, 592 (4th Cir. 1985); *George Foreman Associates, Ltd. v. Foreman*, 389 F.Supp. 1308, 1315-1316 (N.D. Cal. 1974), *aff'd*, 517 F.2d 354 (9th Cir. 1975); *cf.*, *Alexander v. Angel*, 37 Cal.2d 856, 863 (1951); *People ex rel. Dept. Pub. Wks. v. Metcalf*, 79 Cal.App.3d 1, 8 (1978).

There is therefore no currently existing contract that can even be creatively construed to provide petitioners with the successor rights they now belatedly seek to enforce. As the district court correctly found, whatever successor rights were held by plaintiffs were left at the bargaining table in 1982 and are not enforceable against any of the respondents now. Since petitioners claims lack any conceivable merit, their petition should be dismissed on this ground as well.

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language of the Court's opinion. As Justice Stephens noted in speaking for a unanimous court, "The district judge's view of the merits is understandable." Appendix to Petition at 7a.

CONCLUSION

As the Court of Appeals held, on the unique record presented here petitioners seek relief that the federal courts cannot and should not provide. Petitioners, like their seventeen fellow plaintiffs, should be left to pursue their alleged remedy in arbitration, and the Petition for Writ of Certiorari should be dismissed.

DATED: August 21, 1987.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By PETER W. DAVIS
Counsel of Record for Respondents